No. 87-107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BRENDA PATTERSON,
Petitioner,
v.
McLEAN CREDIT UNION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF 66 MEMBERS OF THE UNITED STATES SENATE AND 118 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER †

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan congressional group of 66 members of the United States Senate and 118 members of the United States House of Representatives.[2] *Amici* have a dual interest in this Court's reconsideration of the interpretation of Section 1981, 42 U.S.C. § 1981, adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976). First, *amici* have an institutional interest in the stability of statutory precedents. That concern is particularly compelling here because this Court is calling into question

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[1] Both petitioner and respondent have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[2] Individual *amici* are listed beginning on the inside front cover.

the validity of its interpretation of Section 1981, long after the Congress has accepted that interpretation and acted affirmatively to build upon it.

Second, *amici* have a significant interest here because of their role in enacting legislation to eradicate the evils of racial discrimination. Such discrimination, as this Court has recognized, is contrary to "fundamental public policy,"[4] and its elimination has become, particularly over the past three decades, a paramount national goal. Section 1981, as interpreted by this Court, furthers that policy. It covers a range of conduct that other statutes do not reach, such as the racial discrimination in private school admissions at issue in *Runyon*.

The interests of *amici* would be adversely affected by the overruling of *Runyon*. The legislative effort necessary to restore this Court's original interpretation would likely be fractious and divisive, since corrective legislation would, in all likelihood, compel the Congress to address numerous peripheral questions concerning the scope and application of Section 1981.

For these institutional reasons, *amici* urge this Court not to overturn *Runyon's* interpretation of Section 1981 as prohibiting intentional racial discrimination in the making and enforcing of private contracts. *Amici* take no position on whether Section 1981 should apply to the particular facts of this case.

SUMMARY OF THE ARGUMENT

This Court's interpretation of Section 1981 in *Runyon* v. *McCrary* as prohibiting private discrimination in the making and enforcing of contracts should not be overturned. Section 1981, as interpreted in *Runyon*, is an essential component of the statutory framework barring discrimination by private parties. It affords a broad-based remedy for intentional racial discrimination that

[4] *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 594 (1983).

complements other more specific statutes. Overturning *Runyon* and forcing the Congress to revisit this area would not only impose significant, unnecessary burdens on the legislative process, but could threaten the repose that the Nation has obtained on the issue of racial discrimination. Adherence to *stare decisis* is essential if the unique interplay between the Congress and the Court that has existed in the development of civil rights law is to be maintained.

The Congress' primary role in lawmaking under the Constitution dictates that any change in the meaning of a statute be effected legislatively rather than judicially. In exercising its constitutional power to legislate, the Congress must be able to rely on the stability of the Court's interpretations of its statutes. For this reason, *stare decisis*, as this Court has repeatedly recognized, operates with its greatest strength where a statutory interpretation, such as *Runyon*, is concerned.

There are no special circumstances present here that would justify departing from *stare decisis* and this customary institutional relationship between the Congress and the Court. First, *Runyon* was not based on an incomplete analysis. Rather, it was the culmination of a series of decisions in which the Court thoroughly analyzed the legislative history of Section 1981 and considered the arguments for and against the applicability of Section 1981 to private conduct. Second, *Runyon* was not a sport in the law, nor have subsequent legal developments undercut its vitality. Instead, *Runyon* has been accepted as well-settled law by this Court, by the Executive, and by the Congress. Third, *Runyon's* interpretation of Section 1981 is a straightforward rule which has been readily applied by the lower courts and has not proven confusing or unworkable. Fourth, individuals have legitimately relied upon Section 1981's prohibition of private contract-related discrimination since *Runyon*, and that reliance would be frustrated were *Runyon* to be overturned. Fifth, and finally, no relevant factual circumstances,

whether social, economic or otherwise, have changed since *Runyon* was decided.

The case against overturning *Runyon* is particularly strong because the Congress has affirmatively endorsed this Court's construction of Section 1981 as reaching private discrimination. The Court has found congressional approval of a judicial construction of a statute in cases where the Congress has (1) rejected efforts to pass legislation that would have overruled or limited the reach of the judicial interpretation, or (2) failed to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of that interpretation. Both these circumstances are present here.

At two key junctures, the Congress has made its intent plain. In 1972, when considering amendments to Title VII of the Civil Rights Act of 1964, the Congress addressed and rejected proposals to eliminate recourse to Section 1981 in the area of employment discrimination. In 1976, the Congress enacted the Civil Rights Attorney's Fees Awards Act, which extended to prevailing parties the right to recover attorney's fees in actions brought under Section 1981. The Congress recognized, in considering this legislation, that Section 1981 provides remedies for discrimination by private parties. These actions, explicitly predicated on Section 1981 continuing to have the meaning given to it by this Court, give rise to a virtually conclusive presumption that the Congress has approved *Runyon*.

ARGUMENT

In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. The Court has now requested the parties to brief "[w]hether or not th[at] interpretation . . . should be reconsidered." *Amici* urge the Court not to overrule *Runyon*.

I. SECTION 1981, AS INTERPRETED BY THIS COURT, IS AN INTEGRAL COMPONENT OF THIS NATION'S CIVIL RIGHTS LAWS.

Runyon is one of the essential civil rights precedents established by this Court over the past twenty years. In 1968, the Court foreshadowed *Runyon* by holding in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that Section 1982, 42 U.S.C. § 1982, a related statute, prohibits racial discrimination in private property transactions. Then, in 1975, the Court concluded in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), that Section 1981 reaches private discrimination in employment. *Runyon* simply built upon these foundations.

As interpreted in *Runyon*, Section 1981 is an integral component of the statutory framework that the Congress has developed to bar private racial discrimination. Other more detailed statutes afford comprehensive remedies for acts of discrimination by specified private parties, *e.g.*, employers of a certain size, restaurants, and hotels. These statutes often have easier standards of proof and are often enforceable by the Executive Branch.[4] Section 1981 affords victims of discrimination a complementary, broad-based remedy for many forms of contract-related intentional racial discrimination, including discrimination by parties not covered by other statutes. It is not an exaggeration to say that overturning *Runyon*, and adopting the view that Section 1981 addresses only state statutes and other state actions that disable minorities from making or enforcing contracts, would effectively render Section 1981 a nullity. Under that reading, Section 1981 would bar only conduct that is already prohibited by the Fourteenth Amendment by its own force.

Amici's concern for the viability of *Runyon's* interpretation of Section 1981 is not lessened by the fact that the Congress may legislatively alter a statutory interpreta-

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[4] *See, e.g.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.*

tion of the Court. Any congressional effort to change a decision of this Court could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute. But with regard to one of the core civil rights statutes, the costs are far greater. To require the Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination. If the Court overturns *Runyon*, intentional racial discrimination that is now illegal could exist for years without remedy, while the Congress debates the scope and details of new legislation.

The experience with this Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), is illustrative. The Court concluded in 1984 that the Congress had intended that statutory provisions prohibiting discrimination in certain federally-funded programs be narrowly construed. Despite overwhelming agreement that *Grove City* should be overturned, it took the Congress a "long and troubled"[8] four years—in significant part because of disagreements over collateral issues—to enact legislation to accomplish that result.[9] In the mean-

[8] 134 Cong. Rec. S2744 (daily ed. Mar. 22, 1988) (statement of Sen. Chafee).

[9] *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). One bill to overturn this Court's decision in *Grove City* was introduced the same day the decision was handed down. 130 Cong. Rec. 3661-62 (1984). Another bill, introduced two months later, 130 Cong. Rec. S4585 (daily ed. Apr. 12, 1984), actually passed in the House of Representatives, but failed in the Senate due to an end-of-session filibuster. 131 Cong. Rec. 2149 (1985) (statement of Sen. Kennedy); S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the next session of the Congress, legislation to overturn *Grove City* was introduced in both the House and Senate. 131 Cong. Rec. 901 (1985) (House); 131 Cong. Rec. 2151 (1985) (Senate). The Senate bill was never reported out of the

time, institutions receiving federal funds were free to discriminate on racial or other grounds as long as they did not discriminate in particular federally-funded programs.[7]

Amici wish to make clear that what is at stake here is not legislative convenience, but the vital interaction that has developed between the Congress and the Court in protecting the Nation against the evils of racial discrimination. The doctrine of *stare decisis* is essential to that interaction.

II. *STARE DECISIS* DICTATES CONTINUED ADHERENCE TO THE INTERPRETATION OF SECTION 1981 ADOPTED BY THIS COURT IN *RUNYON v. McCRARY*.

The orderly functioning of our government requires that the Congress be able to rely on the stability of stat-

Committee on Labor and Human Resources. S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1988). In the House, the bill was favorably reported by both the Judiciary and the Education and Labor Committees, H.R. Rep. No. 963, 99th Cong., 2d Sess. Parts 1 and 2 (1986), but was never brought to the full House.

The Civil Rights Restoration Act of 1987 was introduced on February 19, 1987, with 51 senators cosponsoring the bill. 133 Cong. Rec. S2249 (daily ed. Feb. 19, 1987). But it was not until almost a year later that it passed in the Senate, 134 Cong. Rec. S266 (daily ed. Jan. 28, 1988), and several weeks more before it passed in the House. 134 Cong. Rec. H397-98 (daily ed. Mar. 2, 1988). The President vetoed the bill, principally because of concerns that it might impinge upon the affairs of religious institutions and small businesses. Message to the Senate on Civil Rights Legislation, 24 Weekly Comp. Pres. Doc. 353 (Mar. 16, 1988). The Congress overrode the veto and thus, more than four years after *Grove City* was decided, overturned that decision. 134 Cong. Rec. S2765 (daily ed. Mar. 22, 1988) (Senate override); 134 Cong. Rec. H1071-72 (daily ed. Mar. 22, 1988) (House override).

[7] *See* 134 Cong. Rec. S2751 (daily ed. Mar. 22, 1988) (statement of Sen. Domenici) ("[F]or the past 4 years, while legislation has been drafted and redrafted and hearings have been held, discrimination against individuals on the basis of race, sex, age, and physical handicap has occurred because of the Supreme Court's decision.").

utory interpretations. Once the Congress has enacted a law, and this Court has interpreted it, the Congress relies on the Court to refine that precedent and apply it to specific cases. But the Congress must be able to assume that a construction of a statute, rendered by this Court after full and fair consideration, is fixed so that the Congress can build upon it if it chooses. Without the exceptional vigor of *stare decisis* in the statutory arena, this partnership between the Congress and the Court would break down. If that happened, the Congress would bear a continuing and onerous burden of having to signal its agreement with each of the Court's statutory interpretations, or face unexpected reversal of those interpretations.

The doctrine of *stare decisis* is a venerable principle of judicial decisionmaking which has been recognized by this Court since the earliest days of the Republic.[8] It has retained its importance because of the fundamental values it protects and promotes. First, it furthers "the stability and predictability required for the ordering of human affairs over the course of time."[9] Second, it promotes judicial efficiency by ensuring that today's judges need not rehear every past decision, but can instead "lay [their] own course of bricks on the secure foundation of the courses laid by others who [have] gone before [them]."[10] Finally, in the broadest and grandest sense,

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[8] *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807).

[9] *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). *See also Helvering v. Hallock*, 309 U.S. 106, 119 (1940) ("[*S*]*tare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.").

[10] B. Cardozo, The Nature of the Judicial Process 149 (1921). *See also Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring); R. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 72-73 (1961); K. Llewellyn, The Bramble Bush 64-65 (1951).

it legitimates our system of the rule of law, and the role of the Supreme Court in that system."[11] Justice Harlan summed up these considerations for a unanimous Court 18 years ago:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.[12]

Thus, in reconsidering any established rule, this Court must give great weight to these considerations. In this case their proper application is clear. *Runyon* should not be overruled.

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[11] *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*Stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact."); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. at 154 (Stevens, J., concurring) ("Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office."); Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 749, 752 (1988) ("[*S*]*tare decisis* operates to promote system-wide stability and continuity by ensuring the survival of governmental norms that have achieved unsurpassed importance in American society. . . . A general judicial adherence to constitutional precedent supports a consensus about the rule of law, specifically the belief that all organs of government, including the Court, are bound by the law.").

[12] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

A. The Institutional Relationship Between the Congress and the Court Makes Application of *Stare Decisis* to a Statutory Interpretation Such As *Runyon v. McCrary* Particularly Appropriate.

Runyon is a statutory rather than a constitutional holding. This Court has repeatedly distinguished between constitutional and statutory cases for purposes of *stare decisis*, and has pronounced itself particularly loath to ignore the doctrine of *stare decisis* where an earlier statutory interpretation is at issue, given that "*stare decisis* has more force in statutory analysis than in constitutional adjudication . . . ."[13] The Court has adhered to that axiom in practice.

One reason for this distinction is that "in the area of statutory construction . . . Congress is free to change this Court's interpretation of its legislation."[14] Another

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[13] *Monell v. Department of Social Serv.*, 436 U.S. 658, 695 (1978). *See also id.* at 708 (Powell, J., concurring); *id.* at 714 (Rehnquist, J., dissenting) ("[C]onsiderations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (A "strong presumption of continued validity . . . adheres in the judicial interpretation of a statute."); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61, 84 (1985) ("[W]e should follow the normal presumption of *stare decisis* in cases of statutory interpretation."); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 60 (1977) (White, J., concurring) ("[C]onsiderations of *stare decisis* are to be given particularly strong weight in the area of statutory construction."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction. . . ."); *Runyon v. McCrary*, 427 U.S. at 175; *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257-58 (1970) (Black, J., dissenting); *Erie R.R. v. Tompkins*, 304 U.S. 64, 77 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.").

[14] *Illinois Brick Co. v. Illinois*, 431 U.S. at 736. Of course, as the *Grove City* experience illustrates, there are significant costs involved in legislatively overruling a decision of this Court. *See supra* Part I.

reason that "this Court is surely not free to abandon settled statutory interpretation at any time a new thought seems appealing,"[15] is found in "the deference that this Court owes to the primary responsibility of the legislature in the making of laws."[16] The Congress is vested by Article I of the Constitution with "all legislative powers." The Court properly interprets statutes enacted by the Congress because interpretation is required to decide cases brought before it. However, once rendered, a statutory interpretation becomes "an integral part of the statute."[17] While the Congress is free to overturn a statutory precedent for any reason it sees fit, the judicial branch is not similarly free to reverse precedents whenever judges have second thoughts. In Justice Black's words:

> Altering the important provisions of a statute is a legislative function. . . . Having given our view on the meaning of a statute, [the Court's] task is concluded, absent extraordinary circumstances. When the Court changes its mind years later, simply because the judges have changed, in my judgment, it takes upon itself the function of the legislature.[18]

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[15] *Monell v. Department of Social Serv.*, 436 U.S. at 713 (Rehnquist, J., dissenting).

[16] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 257 (Black, J., dissenting).

[17] *Gulf, Colorado & Santa Fe Ry.*, 275 U.S. 133, 136 (1927).

[18] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. at 258 (Black, J., dissenting). While the majority in *Boys Markets* overturned a statutory interpretation, it did not disagree with the principle articulated by Justice Black, but differed only on the application of that principle to the facts of the case. *See also Commissioner v. Fink*, 107 S. Ct. 2729, 2737 (1987) (Stevens, J., dissenting) ("The relationship between the courts or agencies, on the one hand, and Congress, on the other, is a dynamic one. In the process of legislating it is inevitable that Congress will leave open spaces in the law that the courts are implicitly authorized to fill. The judicial process of construing statutes must therefore include an exercise of lawmaking power that has been delegated to the courts by Congress. But after the gap has been filled, regardless of whether it is filled exactly as Congress might have

B. There Are No Special Circumstances in This Case That Justify Overruling *Runyon* v. *McCrary*.

Although the Court does, from time to time, overrule earlier decisions, the mere fact that the Court might have reached a different result had it decided the earlier case has never been thought a sufficient justification for doing so. Instead, "[a]ny departure from the doctrine of *stare decisis* demands special justification."[10] And where a prior statutory precedent is at issue, "[o]nly the most compelling circumstances can justify this Court's abandonment of such firmly established . . . precedents."[11] In this case, the factors which the Court heretofore has considered relevant in determining whether such "compelling circumstances" exist do not support overruling *Runyon*.

1. *The Interpretation of Section 1981 Adopted in* Runyon v. McCrary *Was Not Based Upon an Incomplete Analysis.*

In determining whether to overrule a prior decision, the Court has sometimes taken into account whether the decision fully considered competing arguments.[12] Here, consideration of this factor clearly counsels in favor of leaving *Runyon* undisturbed.

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intended or hoped, the purpose of the delegation has been achieved and the responsibility for making any future change should rest on the shoulders of Congress.").

[10] *Arizona* v. *Ramsey*, 467 U.S. 203, 212 (1984).

[11] *Monell* v. *Department of Social Serv.*, 436 U.S. at 713 (Rehnquist, J., dissenting). *See also Vasquez* v. *Hillery*, 474 U.S. at 266 ("[T]he careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons. . . . [E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective.").

[12] *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 766 (1984) (overruling previous decisions interpreting Section 1 of the Sherman Act to reach "intra-enterprise" conspiracies: "[W]hile this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule. . . .").

Runyon's interpretation of Section 1981 as prohibiting private contract-related racial discrimination in education was not an aberration. It evolved from the Court's earlier decisions in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *Tillman* v. *Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973), and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). In both *Runyon* and these prior decisions, the Court fully and carefully considered the competing arguments.

Jones held that Section 1982 reaches private racial discrimination in property transactions. The Court analyzed in detail the Reconstruction-era legislative history, which relates to both Sections 1981 and 1982, to determine whether the statute was intended to reach private, as well as governmental, conduct. 392 U.S. at 422-37. The Court concluded that the Congress "plainly meant to secure" the right to purchase or lease property "against interference from any source whatever, whether governmental or private." *Id.* at 424.[13] In *Tillman*, the Court recognized that Section 1981 reached the conduct of a private association that operated a neighborhood swimming pool. In making that determination, the Court again recognized the intertwined legislative histories of Sections 1981 and 1982. The Court concluded that there was "no reason to construe these sections differently" under the facts before it. 410 U.S. at 440. Two years after *Tillman*, the Court unanimously stated in *Johnson* that "it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." 421 U.S. at 459-60.[14]

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[13] This Court has subsequently affirmed *Jones* on numerous occasions. *See, e.g., Shaare Tefila Congregation* v. *Cobb*, 107 S. Ct. 2019, 2021 (1987); *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. at 435; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 235-36 (1969).

[14] The *Runyon* Court described this statement as "the square holding" and the "unequivocal[]" holding of *Johnson*. 427 U.S. at 170 n.8, 172. And the United States characterized the statement

In 1976, the *Runyon* Court, citing *Jones*, *Tillman*, and *Johnson*, concluded that "[i]t is now well established that . . . [Section] 1981 prohibits racial discrimination in the making and enforcement of private contracts." 427 U.S. at 168. Nevertheless, the Court again carefully reviewed the legislative history of Section 1981. *Id.* at 168-71, 174-75. The Court considered and rejected, as "wholly inconsistent" with its earlier precedents, the argument that Section 1981 reached only state-sponsored discrimination. *Id.* at 173. The Court also rejected the argument that Section 1981 prohibits only legal rules that disable minorities from making and enforcing contracts. *See id.* at 194 (White, J., dissenting).

Indeed, the Court has so fully and completely considered the Reconstruction-era legislative history of Section 1981 that, following its decision in *Runyon*, the Court has merely incorporated the prior analyses by reference, rather than "repeat the narrative again." [26]

Accordingly, *Runyon* cannot be said to be based upon an incomplete analysis or less than full consideration of competing arguments.

2. *The Interpretation of Section 1981 Adopted in* Runyon v. McCrary *Has Not Been Undercut by Subsequent Legal Developments.*

Another factor the Court has sometimes considered in determining whether to overrule an earlier decision is whether the reasoning of the earlier decision has been undercut by subsequent legal developments. In such cases, the Court is often making explicit what has been implicit

as the "ratio decidendi" of *Johnson*. Brief for the United States as Amicus Curiae at 14, *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (No. 75-62). *Johnson* was a Section 1981 action against a private defendant. The actual issue before the Court concerned the applicable statute of limitations. The Court would not have reached that issue if Section 1981 did not provide a cause of action for acts of racial discrimination by private parties.

[26] *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 384 (1982).

for some time. The overruling simply culminates a long process of erosion." [27] Similarly, the Court has sometimes revisited a decision found to be wholly inconsistent with prior decisions or inconsistent with a parallel line of authority. [28]

Runyon's reasoning and holding have not been undercut by subsequent legal developments. No decision rendered by this Court has questioned the continuing vitality of the interpretation of Section 1981 adopted there. On the contrary, this Court has repeatedly and without exception treated *Runyon* as well-settled law. [29] The Executive Branch has also consistently supported the interpretation of Section 1981 adopted in *Runyon*, [30] and no de-

[27] *See, e.g., Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320, 322 (1972) ("Later cases from this Court have repudiated the reasoning advanced in support of the result reached in [the earlier decision]."); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. at 238 ("[S]ubsequent events have undermined [the] continuing validity [of the earlier decision]."). *See also Puerto Rico* v. *Branstad*, 107 S. Ct. 2802, 2809 (1987) ("'[The earlier decision] is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development.'").

[28] *See, e.g., Monell* v. *Department of Social Serv.*, 436 U.S. at 695 (justifying overruling *Monroe* v. *Pape*, 365 U.S. 167 (1961), in part on ground that *Monroe* "was a departure from prior practice" and inconsistent with a subsequent line of cases "holding school boards liable in § 1983 actions. . . .").

[29] *See, e.g., Goodman* v. *Lukens Steel Co.*, 107 S. Ct. 2617, 2620 (1987); *Saint Francis College* v. *Al-Khazraji*, 107 S. Ct. 2022, 2026 (1987); *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984); *Bob Jones Univ.* v. *United States*, 461 U.S. at 596; *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. at 384; *City of Memphis* v. *Greene*, 451 U.S. 100, 125 n.38 (1981); *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 377 (1979); *Cook* v. *Hudson*, 429 U.S. 165 (1976); *McDonald* v. *Santa Fe Trail Trans. Co.*, 427 U.S. 273, 285 (1976).

[30] *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 10, *Patterson* v. *McLean Credit Union* (No. 87-107); Brief for the United States at 38, *Goldsboro Christian*

velopments in the Congress have eroded the reasoning of *Runyon*. Indeed, as discussed in Part III, the Congress has convincingly demonstrated that it fully agrees with *Runyon's* interpretation of Section 1981.

Nor is *Runyon* a sport in the law. It is neither out of step with prior decisions, as discussed above, nor inconsistent with any parallel line of authority in this Court.

3. *The Interpretation of Section 1981 Adopted in* Runyon v. McCrary *Has Not Proved Confusing or Unworkable in Practice.*

A third factor the Court has considered is whether the earlier case has caused confusion or created practical difficulties for the lower courts in applying the law.[28] Clearly *Runyon* has not.

Runyon straightforwardly held that Section 1981 reaches private parties who intentionally discriminate on

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Sirkoula, Inc. v. *United States*, reported as *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983) (No. 81-1); Brief for the Secretary of Commerce at 20 n.6, *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) (No. 87-1007); Brief for the United States as Amicus Curiae at 7, *McDonald* v. *Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976) (No. 75-260); Brief for the United States as Amicus Curiae at 15, *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (No. 75-62).

[28] *See, e.g., Swift & Co.* v. Wickham, 382 U.S. 111, 124 (1965) (overruling earlier statutory decision that "in its practice unworkable . . . lower courts have . . . sought to avoid dealing with its application or have interpreted it with uncertainty"). *See also Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (overruling *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), in part because "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'" had proved "unworkable in practice"); *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1140-41 (1988) ("A half century's experience has persuaded us . . . that the rule is . . . unworkable and arbitrary in practice. . . . [T]he gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation.").

the basis of race in the making and enforcement of contracts. Since there has never been any question that Section 1981 also reaches state-sponsored racial discrimination, *Runyon* simply made clear that Section 1981 applies across the board without regard to the identity or position of the actor. Lower courts, following *Runyon*, have not found this general principle to be confusing or unworkable.[29] Of course, this Court's guidance may be necessary in fine-tuning that principle and applying it to specific cases such as this one. But that ongoing process is not a reason to overrule a general principle already established.

4. *Overruling the Interpretation of Section 1981 Adopted in* Runyon v. McCrary *Would Frustrate Legitimate Reliance Interests.*

Another factor this Court has considered is whether "'individuals may have arranged their affairs in reliance on the expected stability of the decision.'"[30] Where there has been no legitimate reliance on the decision, the Court may feel less bound by *stare decisis*.

In *Monell* v. *Department of Social Services*, 436 U.S. 658, 700 (1978), for example, the Court noted that its earlier decision holding municipalities immune from suit under Section 1983, 42 U.S.C. § 1983, could not be legitimately relied upon by municipalities because violations

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[29] *See, e.g., Wright* v. *Salisbury Club, Ltd.*, 632 F.2d 309, 312 (4th Cir. 1980); *Mennemeyer* v. *Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Hall* v. *Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978); *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Nieto* v. *UAW, Local 598*, 472 F. Supp. 987, 988-89 (E.D. Mich. 1987); *Miller* v. *Hall's Birmingham Wholesale Florist*, 640 F. Supp. 948 (N.D. Ala. 1986); *Mays* v. *Chrysler Corp.*, 603 F. Supp. 1185, 1190 (E.D. Mo.), *aff'd*, 633 F.2d 1563 (8th Cir. 1979); *Hollander* v. *Sears, Roebuck & Co.*, 450 F. Supp. 496, 499-500 (D. Conn. 1978).

[30] *Monell* v. *Department of Social Serv.*, 436 U.S. at 700 (quoting *Monroe* v. *Pape*, 365 U.S. at 221-22 (Frankfurter, J., dissenting)).

of constitutional rights are "completely wrong" and public bodies cannot arrange their affairs "on an assumption that they can violate constitutional rights indefinitely . . . ." In contrast, *Runyon* is a decision which protects against violations of the statute and provides relief for them, rather than shielding violators, and reliance on it is unquestionably legitimate.

Clearly, individuals "have arranged their affairs in reliance on the expected stability of" *Runyon*'s ruling that Section 1981 prohibits private racial discrimination in the making and enforcing of contracts. For example, parents have made arrangements to place their children in private schools with the legitimate expectation that Section 1981 ensures that those schools are not now segregated, and will not be segregated in the future. The Congress has also legitimately relied on *Runyon* by enacting legislation predicated on Section 1981 continuing to have the meaning given to it in *Runyon*. *See infra* Part III.

If *Runyon* is overruled, this reliance—by individuals as well as by the Congress—would be frustrated at great social and emotional cost. The very purpose of Section 1981, like all other civil rights laws, is to change behavior and, therefore, expectations. The progress wrought by these laws is considerable and undeniable. The stability of decisions in this area is vital to the success of the Nation's effort to eliminate racial discrimination. Those individuals whose rights are protected by anti-discrimination statutes should be able to rely on settled precedent in arranging their affairs, and those whose conduct is governed by such laws should not be led to expect that they can escape their legal obligations by reversals in statutory interpretations.[30]

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[30] *See Patsy v. Board of Regents*, 457 U.S. 496, 501 n.8 (1982) (refusing to overrule prior cases that had refused to read exhaustion of administrative remedies requirements into Section 1983, in part because "[o]verruling those decisions might injure those § 1983 plaintiffs who had foregone or waived their state administrative remedies in reliance on those decisions").

5. *There Has Been No Relevant Change in Social, Economic or Other Factual Circumstances Since* Runyon v. McCrary.

Finally, in the constitutional context, the Court has sometimes overruled an earlier decision on the ground that some underlying factual circumstance—social, economic, or otherwise—has changed.[31] In Justice Stewart's words, "[a] substantial departure from precedent can . . . be justified . . . in the light of an altered historic environment."[32] So far as *amici* are aware, this factor has rarely, if ever, been applied in the statutory context and, in any event, does not apply to *Runyon*.

No relevant social or economic circumstance has changed since 1976. If there was a "factual circumstance" that influenced the Court's interpretation of Section 1981 in *Runyon*, it was the recognition that "[t]he policy of the Nation . . . in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society." 427 U.S. at 191 (Stevens, J., concurring). That policy has not changed. Today the nation remains committed to "the fundamental policy of eliminating racial discrimination."[33]

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In sum, the factors this Court considers in determining whether to apply *stare decisis* overwhelmingly counsel that *Runyon* not be overruled. As the Court stated

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[31] *See, e.g., Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (overruling decision that had upheld the systematic exclusion of women from jury service because "[i]f it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed"); *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954) (*overruling Plessy v. Ferguson*, 163 U.S. 537 (1896), in part because the insidious psychological effects of segregation on school children "is amply supported by modern authority").

[32] *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 634-35 (1974) (Stewart, J., dissenting).

[33] *Bob Jones Univ. v. United States*, 461 U.S. at 595.

more than 40 years ago in refusing to overrule the interpretation of another Reconstruction-era civil rights statute adopted in *United States v. Classic*, 313 U.S. 299 (1941):

> The construction given § 20 [18 U.S.C. § 242] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have a situation here comparable to *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase "under color of any law" involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 to meet the exigencies of each case coming before us.

Screws v. United States, 325 U.S. 91, 112-13 (1945).

The reasoning in *Screws* applies fully here. It is made more compelling by the fact, as *amici* show below, that this Court's interpretation of Section 1981 has been affirmatively approved by the Congress.

III. *STARE DECISIS* APPLIES WITH SPECIAL FORCE BECAUSE THE CONGRESS HAS AFFIRMATIVELY ENDORSED THIS COURT'S INTERPRETATION OF SECTION 1981.

This Court has recognized that the doctrine of *stare decisis* has particular force where the Congress has taken subsequent legislative action consistent with the Court's

interpretation of a statute.[36] Thus, where the Congress has reenacted a statute, this Court's prior construction of the statute is presumed to have been adopted by the Congress.[37] Likewise, the Court has found congressional approval of a judicial interpretation of a statute in the Congress' rejection of legislation that would have overruled or limited the reach of the judicial interpretation,[38]

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[36] *See, e.g., Patsy v. Board of Regents*, 457 U.S. at 501 ("whether overruling [prior] decisions would be inconsistent with more recent expressions of congressional intent" is "particularly relevant" in deciding "whether prior decisions should be overruled or reconsidered"); *Monell v. Department of Social Serv.*, 436 U.S. at 696-99.

[37] *See, e.g., Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 279 (1977) (where the Congress has reenacted a statute "in substantially the same form," the Court "can safely assume that Congress was aware of the [interpretation given the statute by the Court and] . . . that Congress has ratified th[at] statutory interpretation. . . ."); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("[T]here is a presumption that Congress, in reenacting the [statute] . . . was aware of the settled judicial construction of the statut[e]. In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'") (*quoting Hecht v. Malley*, 265 U.S. 144, 153 (1924)).

[38] *See, e.g., Local 93 of the Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3047 (1986) ("Congress was aware that both the Executive and Judicial Branches had used [race-conscious affirmative action] as a remedy under [Title VII], and rejected amendments that would have barred such remedies. . . . [This] confirms Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII . . . ."); (opinion of Brennan, J.); *Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972) ("[L]egislation [that would have overturned judicial interpretation of statute] has been introduced repeatedly in Congress but none has ever been enacted. . . . We continue to be loath . . . to overturn those cases *judicially* when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."); *Joint Indus. Bd. v. United States*, 391 U.S. 224, 228 (1968) (refusing to override interpretation of Bankruptcy Act adopted in *United States v. Embassy Restaurant, Inc.*, 359 U.S. 29 (1959), because section of Act interpreted "was left unchanged despite the fact that in every Congress since *Embassy Restaurant*

as well as in the Congress' failure to change the judicial interpretation in the course of enacting or amending related legislation which reflects the Congress' awareness of the interpretation.[20]

Here, the Congress has both declined to enact legislation that would have effectively repealed Section 1981 as it relates to employment discrimination, and left *Runyon* untouched in the course of enacting related legis-

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bills have been introduced to overrule or modify the result reached in that case").

[20] *See, e.g., Monessen S.W. Ry. v. Morgan*, 56 U.S.L.W. 4494, 4496 (June 6, 1988) (where the Congress amended the Federal Employers' Liability Act several times, but never attempted to amend it to provide for prejudgment interest, "'Congress at least acquiesces in, and apparently affirms'" the judicial interpretation that prejudgment interest is not available under the Act) (*quoting Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 419 ("Particularly because the legislative history reveals clear congressional awareness of [an earlier interpretation of the statute by the Court] . . . the fact that Congress specifically addressed this area and left [the earlier decision] undisturbed lends powerful support to [its] continued viability."); *Patsy v. Board of Regents*, 457 U.S. at 506-09 (Court declined to overturn its earlier decisions holding that exhaustion of administrative remedies was not mandated under Section 1983, in large part because the Congress, in a subsequent enactment of a related statute, had "clearly expressed its belief" that "the no-exhaustion rule should be left standing."); *Lindahl v. OPM*, 470 U.S. 768, 782 (1985); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983) (The Congress' decision to leave intact one section of securities laws in the course of revising other sections of securities laws "suggests that Congress ratified" judicial interpretation given to that section.); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) ("[T]he fact that a comprehensive reexamination and significant amendment of the [Commodity Exchange Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); *Missouri v. Ross*, 299 U.S. 72, 75 (1936) (The Congress' permitting a provision of Bankruptcy Act interpreted by Court to "stand for many years . . . although amending . . . the Bankruptcy Act in other particulars . . . is persuasive evidence of the adoption by that body of the judicial construction.").

lation which clearly reflects the Congress' awareness of that interpretation. As this Court stated in *Lindahl v. OPM*, 470 U.S. 768, 782 (1985), the Congress' enactment of related legislation "without explicitly repealing the established [case] doctrine itself gives rise to a presumption that Congress intended to embody [the judicial interpretation in the statute the courts had construed]." That presumption becomes virtually conclusive where, as here, the Congress' actions were predicated on Section 1981 continuing to have the meaning attributed to it by this Court.

Following this Court's decision in *Jones v. Alfred H. Mayer & Co.*, the Congress passed the Equal Employment Opportunity Act of 1972.[21] In the course of enacting that legislation, both the House and Senate considered proposals to make Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), the exclusive federal remedies for private discrimination in employment. These proposals, which were ultimately rejected, would have repealed Section 1981 insofar as it prohibits private racial discrimination in employment.

The amendment proposed in the Senate[22] generated substantial objections from those who believed that Section 1981 served as a "valuable protection" for those who might "fall . . . in the interstices of the Civil Rights Act of 1964."[23] Senator Harrison Williams, the floor manager and one of the original sponsors of the pending bill, objected that "[i]t is not our purpose to repeal existing civil rights laws," and noted that to do so "would severely weaken our overall effort to combat the presence of employment discrimination."[24] Specifically recognizing the scope of Section 1981, Senator Williams stated:

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[21] Pub. L. No. 92-261, 86 Stat. 103 (1972). This Act amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

[22] 118 Cong. Rec. 3173 (1972) (Hruska amendment).

[23] *Id.* at 3370 (statement of Sen. Javits).

[24] *Id.* at 3371 (statement of Sen. Williams).

The law against employment discrimination did not begin with title VII and the EEOC, nor is it intended to end with it. The right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination, was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983. It was recently stated by the Supreme Court in the case of Jones v. Mayer, that these acts provide fundamental constitutional guarantees. In any case, the courts have specifically held that title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

Mr. President, the amendment of the Senator from Nebraska [Sen. Hruska] will repeal the first major piece of civil rights legislation in this Nation's history. We cannot do that. . . . I believe that to make title VII the exclusive remedy for employment discrimination would be inconsistent with our entire legislative history of the Civil Rights Act. It would jeopardize the degree and scope of remedies available to the workers of our country.[46]

Responding affirmatively to Senator Williams' plea that the Congress not "strip from th[e] individual his rights that have been established, going back to the first Civil Rights Law of 1866,"[47] the Senate rejected the repealing amendment.[48]

The House Education and Labor Committee similarly rejected an exclusive remedies provision, explaining that

> the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . [It is] this Committee's belief that the remedies available to the individual under Title VII are coextensive with the individual's right to sue under the

[46] *Id.* at 5971-72.

[47] *Id.* at 5972.

[48] *Id.* at 5978.

> provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.[49]

The Committee minority also recognized that "charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as . . . the Civil Rights Act of 1866 . . . . [O]ur attempt to amend the Committee bill to make title VII an exclusive remedy (except for pattern or practice suits) was rejected."[50]

A substitute bill containing an exclusive remedies provision was proposed in the House during the floor debates.[51] The sponsor of the substitute explained that "there would no longer be recourse to the old 1866 civil rights act."[52] Although vigorously opposed,[53] the substitute bill was adopted by a slim majority in the House.[54] In conference with the Senate, however, the House receded and a compromise version of the bill which contained no exclusive remedy provision became law.[55] The Congress thus unequivocably manifested its intent to preserve the scope of Section 1981 by rejecting efforts to eliminate the statute's application to private employment discrimination.

This legislative history played a significant role in persuading this Court in *Runyon* to adhere to its earlier interpretation of Section 1981:

[49] H.R. Rep. No. 238, 92d Cong., 1st Sess. 18-19 (1971).

[50] *Id.* at 66.

[51] 117 Cong. Rec. 31973-80 (1971) (Erlenborn substitute).

[52] *Id.* at 31973 (statement of Rep. Erlenborn).

[53] Members objected that the substitute bill would "repeal[] the Civil Rights Act of 1866 where it touches upon this field," *id.* at 31978 (statement of Rep. Eckhardt), and would "nullify the Civil Rights Act of 1866 . . . so far as employment discrimination is concerned." *Id.* at 32190 (statement of Rep. Hawkins).

[54] *Id.* at 32211-12.

[55] H.R. Conf. Rep. No. 899, 92d Cong., 2d Sess. 17 (1972).

> It is noteworthy that Congress in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered and rejected an amendment that would have repealed the Civil Rights Act of 1866, as interpreted by this Court in *Jones*, insofar as it affords private-sector employees a right of action based on racial discrimination in employment. . . .

427 U.S. at 174.

In October 1976, after the *Tillman, Johnson* and *Runyon* decisions, the Congress again signaled its approval of this Court's interpretation of Section 1981 in enacting the Civil Rights Attorney's Fees Awards Act of 1976.[48] That Act permits the recovery of attorney's fees in actions against private parties under Section 1981.[49] The House Judiciary Committee summarized the reach of Sections 1981 and 1982 as follows:

> Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald v. Santa Fe Trail Transportation Co.*, —— U.S. ——, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as

[48] Pub. L. No. 94-559, 90 Stat. 2641 (1976) (*codified at* 42 U.S.C. § 1988).

[49] The Congress enacted the Civil Rights Attorney's Fees Awards Act in response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This Court had concluded in *Alyeska* that the federal courts do not have power to award attorney's fees to a prevailing party in actions brought under Section 1981 (among other statutes), save in certain limited circumstances, absent express authorization from the Congress. The Act was passed after the Congress learned of *Alyeska*'s "devastating impact . . . on litigation in the civil rights area." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976).

> the purchase of a home. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[50]

The Committee expressly recognized that Sections 1981 and 1982 and other private discrimination remedies created by the Congress can reach the same private conduct:

> With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, that the two procedures augment each other and are not mutually exclusive." . . . That view was adopted by the Supreme Court in *Johnson v. Railway Express Agency* . . . .[51]

The Committee also made clear that, "[a]s with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 [the Fair Housing Act] are complementary remedies, with similarities and differences in coverage and enforcement mechanism."[52]

The Senate Judiciary Committee considered the Civil Rights Attorney's Fees Awards Act especially necessary because the complementary modern-day remedies for private discrimination provide for attorney's fees. The Committee did not want litigants challenging the same discriminatory practices under the Reconstruction-era statutes to be deprived of such fees. As the Committee explained:

> For instance, fees are now authorized in an employment discrimination action under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites

[50] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 (1976).

[51] *Id.* at 4 n.8 (quoting H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971)).

[52] *Id.* at 4 n.9.

to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights.[29]

By extending the right to recover attorney's fees to suits brought under Sections 1981 and 1982, the Congress ensured that litigants would be financially able to challenge private discrimination under both the Reconstruction-era and modern civil rights statutes.

As this legislative history demonstrates, the Congress' approval of, and its intent to build upon, this Court's interpretation of Section 1981 as reaching discrimination by private parties are unmistakable. The Congress has been fully cognizant of how Section 1981 has been construed by this Court. It has rebuffed legislative efforts to reverse that construction; it has approved and relied on the construction given the statute by this Court; and it has strengthened Section 1981 as a remedy by making attorney's fees available to prevailing parties, thereby encouraging Section 1981's more effective use. Congressional intent could hardly have been more clear if the Congress had reenacted Section 1981 following *Runyon*. However, "[i]n the legal context in which Congress acted, this was unnecessary." [30]

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[29] S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). *See also* 121 Cong. Rec. 26806 (1975) (statement of Sen. Tunney) (Title VII and Section 1981 "protect[] similar rights").

[30] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 387.

CONCLUSION

For the foregoing reasons, this Court should decline to overrule the interpretation of 42 U.S.C. § 1981 adopted in *Runyon v. McCrary*, 427 U.S. 160 (1976).

Respectfully submitted,

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